

Exhibit A

1
2 UNITED STATES DISTRICT COURT
3 SOUTHERN DISTRICT OF OHIO
4 WESTERN DIVISION
5

6 - - -
7 WALTER W. THIEMANN, :
on Behalf of Himself :
8 and of All Others :
Similarly Situated, :

9 :
Plaintiff, :

10 :
VS. : CASE NO. C-1-00-793

11 :
OHSL FINANCIAL :
12 CORPORATION, et al., :

13 :
Defendants. :
14 - - -

15 Hearing before Magistrate Judge Thomas
16 S. Hogan held pursuant to the Federal Rules of
17 Civil Procedure, taken before me, Lee Ann
18 Williams, a Registered Professional Reporter
19 and Notary Public in and for the State of Ohio
20 via telephone, on Tuesday, December 9, 2003, at
21 10:42 a.m.
22
23
24

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1 APPEARANCES:

2 On behalf of the Plaintiffs:
 3 Michael G. Brautigam, Esq.
 4 and
 5 Gene I. Mesh, Esq.
 6 Gene Mesh & Associates
 7 2605 Burnet Avenue
 8 Cincinnati, Ohio 45219

9 On behalf of the Defendants:

10 James E. Burke, Esq.
 11 Kenting, Muething & Klekamp
 12 1400 Provident Tower
 13 One East Fourth Street
 14 Cincinnati, Ohio 45202

15 On behalf of the Defendant Dinsmore &

16 Shohl (via telephone):
 17 John W. Hust, Esq.
 18 and
 19 Michael Maundrell, Esq.
 20 Schroeder, Maundrell, Barbieri
 21 & Powers
 22 110 Governor's Knoll
 23 11935 Mason Road
 24 Cincinnati, Ohio 45249

On behalf of the Defendants:

John B. Pinney, Esq.
 Graydon, Head & Ritchey
 1900 Fifth Third Center
 511 Walnut Street
 Cincinnati, Ohio 45202

On behalf of the Defendants:

Thomas William Breidenstein, Esq.
 Barrett & Weber
 105 East Fourth Street
 Suite 500
 Cincinnati, Ohio 45202

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1 MR. BRAUTIGAM: Good morning, Your
 2 Honor. Thank you very much for arranging to
 3 meet with us, especially on short notice. Your
 4 Honor, the reason I asked for this meeting was
 5 so that we could do the deposition of Norbert
 6 Brinker, and I'd like to give you some
 7 background. Mr. Brinker was the former
 8 chairman of the OHSL Board, he's a key player
 9 in the transaction.

10 And in October of 2002, KMK moved
 11 for protective order with respect to his
 12 deposition and two other gentlemen. Dinsmore
 13 opposed that motion the next day, because they
 14 never had any opportunity to take his
 15 deposition. The plaintiffs opposed that
 16 several days later, so we're talking about
 17 November of 2002.

18 In February of 2003, Your Honor,
 19 you ruled denying the motion for protective
 20 order and you said that when things would move
 21 forward, we could take their depositions. So
 22 nothing happened between February 2003 and
 23 October 20th of 2003, when Judge Beckwith
 24 issued her order hopefully getting the case

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1 On behalf of the Defendant Ernst &
 2 Young (via telephone):

3 James E. Gauch, Esq.
 4 Jones Day
 5 51 Louisiana Avenue, N.W.
 6 Washington D.C., 20001-2113

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1 back on track. Shortly after that I wrote to
 2 Mr. Burke and I said, can we please have some
 3 deposition dates for Mr. Brinker.

4 Mr. Burke wrote me back recently
 5 and said that he met with Mr. Brinker in
 6 October and he was fine, but now Mr. Brinker
 7 may have suffered a mild stroke and he's in
 8 some type of a rehab facility and is unable to
 9 be deposed.

10 Your Honor, what we suggest is
 11 that the plaintiffs go to this facility, Mr.
 12 Brinker can have a doctor present if needed,
 13 and we can depose him for an hour or two at a
 14 time, whatever it takes to get it done.
 15 Obviously if this does not happen, the
 16 plaintiffs are going to be harmed and perhaps
 17 irreparably harmed.

18 MR. BURKE: Your Honor, just to
 19 clarify, the protective order Mr. Brautigam was
 20 referring to originally is the situation we
 21 were all in where there was a debate over the
 22 amended complaint. That's been resolved. And
 23 frankly, we fully expected that Mr. Brinker
 24 would be deposed by now, although we have

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1 raised an issue I'll get to in a second with
 2 Mr. Brautigam about that deposition.
 3 I met personally with Mr. Brinker
 4 at the end of October and he was fine. I told
 5 him that a deposition would be upcoming and he
 6 said, what else can they ask me about. And
 7 frankly we talked a little bit about that.
 8 We tried to schedule a deposition.
 9 In speaking with his daughter, she indicated
 10 that he did have a mild stroke a couple of
 11 weeks ago. I spoke to his doctor today, his
 12 name is Dr. David Smith.
 13 Dr. Smith indicated to me that Mr.
 14 Brinker is wheelchair bound. He -- the impact
 15 of the stroke was not mental. His mental
 16 faculties are still good, but he's very frail.
 17 He's undergoing physical therapy to resume his
 18 ability to walk.
 19 And what I've told Mr. Brautigam
 20 is as soon as Mr. Brinker recovers reasonably
 21 well, you know, we'll arrange for a deposition.
 22 I would point out that it's hard for us to
 23 imagine any prejudice, because this is Mr.
 24 Brinker's deposition transcript.

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1 this kind of record already in existence, I'm
 2 hard pressed to see why we're here. There is
 3 no dispute that this gentleman is ill. Mr.
 4 Brautigam refused to accept my representation
 5 in this regard.
 6 I spoke to Dr. Smith about getting
 7 us a brief letter that indicates, as he told me
 8 today, that this gentleman is not capable of
 9 sitting for a deposition now and I'm prepared
 10 to do that.
 11 THE COURT: What does he think in
 12 terms of time?
 13 MR. BURKE: To be honest with you,
 14 I didn't ask him when. I can certainly ask him
 15 and figure that out. I'm hopeful within the
 16 next couple of months Mr. Brinker is in a home
 17 environment instead of a care facility and
 18 we'll set things up.
 19 I don't want to go over the same
 20 ground again, but on the other hand, we
 21 understand the Court's admonition to get this
 22 case moving. We're going to get Mr. Brinker in
 23 as soon as his health improves. We're going to
 24 produce him for deposition. We're not going to

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1 This was taken in the state court
 2 action in 2000. There are 800 pages of
 3 deposition going in detail through the merger,
 4 the proxy statement, every possible factor.
 5 And I'm willing to submit this to the Court
 6 because one of the things we've raised to the
 7 plaintiff is there is an existing transcript of
 8 a related case of Mr. Brinker's testimony taken
 9 much closer to the date and time that we're
 10 talking about.
 11 We don't want him to have to go
 12 through this again. I mean, there are 800
 13 pages of testimony that Mr. Brinker has already
 14 talked about, which is why he said when told
 15 that he might be deposed again, he said what
 16 else can they possibly ask me, I've answered
 17 all of these questions.
 18 Our point is the gentleman is ill.
 19 I think to suggest that a bunch of lawyers
 20 descend upon a rehabilitation center and
 21 conduct depositions is not just a disservice to
 22 Mr. Brinker, but to the staff and the other
 23 people there where we are. Mr. Brinker's
 24 health improves, we'll produce him. And with

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1 refuse to cooperate with anything. We're going
 2 to get this case moving and get this case
 3 decided.
 4 MR. BRAUTIGAM: Your Honor, if I
 5 can speak. And for Mr. Burke to wave an 800
 6 page transcript and say that I don't know why
 7 Mr. Brautigam is trying to do this, he's trying
 8 to prejudice some elderly, frail man -- this
 9 issue has been decided. I direct your
 10 attention to document 142, you also have
 11 already said that the deposition can go
 12 forward, so that's not to be debated.
 13 Now, with respect to the location
 14 and the circumstances of Mr. Brinker's
 15 deposition, he's wheelchair bound, he can't
 16 walk, he's very frail, I understand that. He
 17 doesn't have to walk anywhere for his
 18 deposition. Your Honor, Mr. Mesh and I have an
 19 obligation to the class to get this done.
 20 We've tried to get it done for years.
 21 The other point I wanted to say is
 22 that Mr. Burke refers to a deposition that was
 23 taken in the last century and different case.
 24 He's repeatedly said that the plaintiffs are

3 (Pages 6 to 9)

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1 attempting to reinvent the case, it's a whole
2 new ball game, words to that effect, everything
3 is completely different, Your Honor, he's
4 trying to have us start over at point zero.

5 So how can he have things both
6 ways? Mr. Brinker is a critical witness.
7 Allow this deposition to go forward, Your
8 Honor. Respectfully I suggest that you issue
9 an order allowing us to go to his rehab
10 facility, have the deposition taken in hour or
11 two hour blocks in the presence of his doctor.

12 MR. BURKE: Will you pay for that?

13 MR. BRAUTIGAM: No. He's not
14 suffering from any mental incapacity, but that
15 could happen. Suppose he has another stroke.
16 Your Honor, one other point, although we're
17 here with respect to the deposition of Mr.
18 Brinker primarily --

19 MR. BURKE: Only, Your Honor.

20 MR. BRAUTIGAM: I disagree.

21 MR. BURKE: If you're going to
22 raise another issue, that's not fair, everyone
23 is not here to respond.

24 MR. BRAUTIGAM: My point is other

1 give a deposition. If Mr. Burke said, can Mr.
2 Brinker come downtown for a full day of
3 depositions, that's not what we're talking
4 about at all.

5 What I would ask for is a specific
6 representation, would it impact Mr. Brinker's
7 health if he were to sit in his wheelchair and
8 be deposed for an hour or two at a time. And
9 with that caveat --

10 THE COURT: Let me stop you a
11 second. How about we get Dr. Smith on the
12 phone jointly and ask him, would that be
13 acceptable?

14 MR. BRAUTIGAM: Absolutely, Your
15 Honor.

16 THE COURT: Why don't we set that
17 up.

18 MR. BURKE: I can have Dr. Smith
19 write a letter.

20 THE COURT: I hate to have him --

21 MR. BURKE: I think a fair
22 question, Your Honor, is when will he be
23 discharged, when will he be in a better
24 position to do this? I mean, it's unthinkable

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1 gentlemen are similarly situated. My point is,
2 there are other gentlemen who are elderly.

3 THE COURT: You're saying that you
4 think that the Court's contact or Mr. Burke's
5 contact with Dr. Smith is an unnecessary step,
6 that we just schedule Brinker's deposition and
7 proceed like we were doctors? In other words,
8 estimate that he needs an hour on several
9 separate occasions or a half hour or an hour
10 and a half? Where is the Court supposed to
11 come up with that number, in left field?

12 I don't know what Mr. Brinker's
13 condition is. His doctor has said, according
14 to Mr. Burke, that he's unable to be deposed
15 now. So if -- if, in fact, we get ahold of Dr.
16 Smith and Dr. Smith says in two weeks he can be
17 deposed for an hour, or in a month he can be
18 deposed for the day or what, do you have any
19 opposition to this, what appears to me to be
20 meaningful colloquy with Dr. Smith one way or
21 the other?

22 MR. BRAUTIGAM: I have no
23 opposition to meaningful colloquy with Dr.
24 Smith. What I would ask is what it means to

1 to me that a gentleman who is in a rehab
2 facility now, that Mr. Brautigam is seriously
3 coming to this Court to say force him to sit
4 for a deposition, but apparently that's what
5 he's doing.

6 I think it is a fair question.
7 This is a surprise to me, I thought Mr. Brinker
8 would be deposed by now in whatever fashion. I
9 think it's fair to say when will he be
10 discharged, when will he be able to sit for
11 several hours at a time in whatever location.

12 At this point the gentleman can't
13 walk, is having a great difficulty navigating
14 around. That's a problem. We will obtain that
15 information from Dr. Smith. I will tell the
16 Court to look at him -- I hope there's no
17 problem with that, that Dr. Smith could give us
18 some kind of written letter indicating some of
19 these dates.

20 Frankly, why every situation in
21 this case has to descend to this remains a
22 mystery to me, but I'm happy to make that call
23 and try to get that information for the Court.

24 THE COURT: Just as long as we

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1 understand. I imagine if you just say
 2 deposition to a doctor, he's got one thing in
 3 mind. If you say that there are options
 4 available by taking bits of testimony so as to
 5 not exhaust the patient --
 6 MR. BURKE: Right.
 7 THE COURT: -- whatever his
 8 capacity is. I want to get going with it, but
 9 I don't want to proceed in the absence of a
 10 doctor's authorization and a tragedy occur, but
 11 I don't know. We'll talk to the doctor.
 12 MR. BURKE: I'll do that, Your
 13 Honor. I told him we would be calling him
 14 back. We had a very brief conversation when we
 15 were trying to set up the conference call this
 16 morning.
 17 THE COURT: That may be real
 18 workable to him. Maybe he can write something,
 19 get him on a conference call so he probably can
 20 tell you quickly if both of you guys won't
 21 disagree, otherwise we can do it from here. I
 22 mean I don't care. I asked Jim just a
 23 question, would it be appropriate to write up
 24 some guidelines with regard to the scope of

1 that's out in the western side of town. That's
 2 as much as I know, Gene.
 3 THE COURT: I'm not sure what the
 4 field would be for strokes and -- a
 5 cardiovascular, I suppose, expert.
 6 MR. MESH: It was on my mind.
 7 THE COURT: I mean, if there's
 8 somebody else maybe more qualified than Smith,
 9 if you want the specialist, okay, rather than
 10 Smith --
 11 MR. BURKE: I'll raise it with Dr.
 12 Smith if there's somebody else that we ought to
 13 be speaking to.
 14 THE COURT: Yes. If he's referred
 15 him to a specialty more appropriate, then we
 16 can bypass Dr. Smith and get right to it,
 17 whoever it is.
 18 MR. BURKE: I can have that
 19 conversation.
 20 MR. MESH: Thank you.
 21 THE COURT: It just occurs to me
 22 that that may not be actually true. The
 23 specialist might say, hey, look, I'm a hired
 24 gun to do this. The internist is really the

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1 the --
 2 MR. BURKE: That's the second
 3 question, Your Honor, which is as to new
 4 claims, new matters, I have no problem with Mr.
 5 Brautigam or Mr. Mesh inquiring of Mr. Brinker
 6 about matters, but as to things that have been
 7 covered in the prior state court litigation --
 8 and we had stipulated with Mr. Brautigam's
 9 former co-counsel who withdrew, Mr. Brualdi,
 10 given the voluminousness of the transcript,
 11 that we would admit this for all purposes of
 12 this case so it does not have to be taken
 13 again, just to spare Mr. Brinker the time and
 14 the effort and, frankly, his counsel the time
 15 and the effort of having to do it again.
 16 So we do believe that it's
 17 appropriate to say what's been covered before
 18 should not be covered again. But we can take
 19 that as it comes as we get closer.
 20 MR. MESH: May I inquire of Mr.
 21 Burke, what is Dr. Smith's specialty?
 22 MR. BURKE: That's a good
 23 question. I think he's just a general
 24 practitioner. It's an internal medicine group

1 person who knows more. I don't know who --
 2 MR. BURKE: I understand he's his
 3 principal treating physician.
 4 THE COURT: Whoever. And maybe
 5 they don't disagree.
 6 MR. BURKE: Certainly, sir, we had
 7 no desire to bring this before the Court. Mr.
 8 Brinker's situation is something that developed
 9 quite recently, and hopefully we will be able
 10 to work through it.
 11 THE COURT: Okay. Well, I need to
 12 hear from you before I can call it.
 13 MR. BURKE: I'll do it.
 14 MR. BRAUTIGAM: Your Honor, there
 15 are several other points related to this.
 16 First of all, many of the OHSL directors are
 17 similarly elderly. Mr. Hillebrand is at least
 18 80. Mr. Hucke is at least 80. Mr. Tenover is
 19 at least 76. Mr. Zoellner is at least 81.
 20 Your Honor, we respectfully submit
 21 that for similar reasons, we need to take their
 22 depositions right away, even with respect to
 23 people have who been deposed in this case
 24 because there are new issues. I respectfully

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1 submit that if this case keeps going on,
2 similar situations will arise. People will
3 have health problems, they're going to have
4 strokes, and the plaintiffs will be harmed by
5 not being able to take their deposition.

6 MR. BURKE: They have taken those
7 depositions, Your Honor, every one of the
8 gentlemen, he's already taken their depositions
9 in this case. We're not talking about the
10 state court action, in the Thiemann action he's
11 deposed those gentlemen. So I guess I'm a
12 little amazed as to what Mr. Brautigam could be
13 talking about, because he deposed several of
14 those gentlemen after he had filed his motion
15 to leave on at least one or two occasions.

16 MR. BRAUTIGAM: I'll be happy to
17 clear that up. Your Honor, there are certainly
18 issues related to the restatement that I want
19 to go back and ask each of these gentlemen
20 about. These relate to the original complaint.
21 Nobody has been deposed since March 5th of
22 2003, and I would like to say, hey, knowing
23 what you know now, that Provident filed
24 overvalued statements, would you do the deal,

1 MR. BRAUTIGAM: Some were, some
2 were not, Your Honor.

3 THE COURT: And they're all
4 directors?

5 MR. BURKE: Of OHSL. I think Mr.
6 McKiernan and Mr. Brinker were deposed in the
7 state court action. Mr. Tenover, Mr.
8 Hillebrand, Mr. Hucke and Mr. Zoellner were all
9 deposed in this action, the Thiemann action. I
10 believe that's accurate.

11 THE COURT: In other words, if I'm
12 remembering right, everybody has been deposed
13 in some form or another?

14 MR. BURKE: Yes, Your Honor, every
15 one of the directors.

16 THE COURT: Mike's point is he
17 wants to depose them based on information
18 learned since the original complaint.

19 MR. BURKE: And if that's the
20 point, information learned since the last
21 deposition of these gentlemen, that's fine. I
22 mean, none of those depositions have been
23 requested. We're over here talking about Mr.
24 Brinker right now. If Mr. Brautigam wants to

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1 would you recommend this in the exercise of
2 your fiduciary duties, would you insist on
3 different terms.

4 So I have no intention of
5 reploting old ground, but, Your Honor, on
6 something of an expedited or emergency basis, I
7 would like an hour with people I've already
8 deposed to talk about this new information
9 before it's too late.

10 So rather than doing it seriatim,
11 Your Honor, I respectfully submit that we have
12 an order permitting this to go forward on a
13 blanket basis rather than coming back because
14 one director breaks his hip and another
15 director has the flu or something like that.

16 THE COURT: It will probably be
17 the same, if you want to somehow restrict it to
18 new ground.

19 MR. BURKE: Oh, absolutely. It
20 seems to me that there's no reason to try to
21 ask questions that have been previously asked
22 of these individuals.

23 THE COURT: Were they deposed in
24 the state court action, too?

1 set up a time where we can bring all of those
2 gentlemen in and go, one, two, three, four, for
3 an hour each and ask for information that has
4 not been requested --

5 MR. BRAUTIGAM: That is not what I
6 need.

7 THE COURT: Okay.

8 MR. PINNEY: The other point is I
9 think we should try to have some time
10 guidelines. Obviously we have a new rule with
11 the clock, but I think these are matters that
12 can and should be dealt with in a very prompt
13 manner and make sure that they don't go on for
14 hours, if not days.

15 MR. BRAUTIGAM: Your Honor, I'm
16 not sure what Mr. Pinney is referring to. He's
17 new in the case and perhaps --

18 THE COURT: Well, I think he's
19 referring to both things, that if I -- if
20 John's referring to the time of the
21 depositions, that's related to the issue we
22 just discussed about going over old ground. If
23 it's the timeliness of the depositions, trying
24 to get them in and all done by a certain time

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1 frame, I'm certainly for that.
 2 MR. BRAUTIGAM: Right.
 3 MR. PINNEY: I thought the concept
 4 of having seriatim, you know, an hour slot here
 5 and then the next one another hour, something
 6 like that, makes a --
 7 MR. BURKE: I think that's what
 8 Mike indicated.
 9 MR. BRAUTIGAM: Your Honor, I
 10 agree with that. I have no intention of
 11 plowing old ground.
 12 THE COURT: Probably the first
 13 time you've agreed to anything.
 14 MR. BRAUTIGAM: There's hope, Your
 15 Honor.
 16 THE COURT: Did you get that, Miss
 17 Court Reporter? They actually agree.
 18 COURT REPORTER: Yes.
 19 MR. MESH: Everybody is nodding
 20 yes. I don't know if you can see, Lee Ann.
 21 THE COURT: It's a shocking
 22 development around the holidays. What time
 23 frame are you talking about? Can they all be
 24 done in a month?

1 environment.
 2 MR. MESH: Your Honor, I take
 3 personal umbrage, rather, at the lack of
 4 deference shown to my office.
 5 MR. BURKE: And the parking is
 6 fine.
 7 MR. MESH: And the water.
 8 MR. BURKE: Well, the front
 9 staircase is difficult for gentlemen of this
 10 age. It is not a handicap-friendly spot.
 11 MR. BRAUTIGAM: We've worked this
 12 out.
 13 THE COURT: At Keating, okay.
 14 MR. BRAUTIGAM: There's one other
 15 point that I wanted to bring to your attention.
 16 We have suggested that Keating has been very
 17 active in resisting discovery in many areas.
 18 And before the October 20th order, we were
 19 successful in getting by subpoena the
 20 depositions of four KMK transactional attorneys
 21 who worked on the merger agreement.
 22 There were two remaining that were
 23 scheduled and for reasons I can't exactly
 24 articulate right now, when the Judge's order

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1 MR. BRAUTIGAM: Yes, Your Honor.
 2 MR. BURKE: A month from now? I
 3 would hope so, Your Honor. I would hope so.
 4 I'll call Mr. Huckle when I get back to the
 5 office and he can contact the other
 6 individuals.
 7 The one thing I don't want to run
 8 into, as we've run into every time, is the
 9 location of the deposition. I would suggest
 10 bringing these gentlemen down to my office or
 11 Mr. Pinney's office and make them available in
 12 our office so nobody has to drive all the way
 13 up to Mr. Mesh's office. And we've had that
 14 fight ad nauseam in this case.
 15 I think it would be relatively
 16 easy for these gentlemen to get in and out of
 17 our office, to come in and sit for a
 18 deposition. That would be the end of that. I
 19 hope we don't get into that fight again.
 20 MR. BRAUTIGAM: Your Honor, I
 21 don't want to shock you, but I'm willing to
 22 agree again.
 23 MR. BURKE: Thank you.
 24 THE COURT: This is a friendly

1 came down, they were unscheduled. And I'd like
 2 to get them scheduled again, but the point that
 3 I want to bring to your attention is in
 4 addition to Mr. Burke and his camp of people
 5 representing the Provident and the OHSL
 6 defendants, there is another camp of KMK
 7 attorneys who are actively working on the case
 8 who have been writing letters in the case, and
 9 in some circumstances have represented the
 10 Provident and Oak Hills defendants, but have
 11 not put in a notice of appearance.
 12 This is difficult for me. First
 13 of all, I think it's improper, but it's also
 14 difficult in terms of scheduling. I don't know
 15 who to call. Mr. Breidenstein, whom I called
 16 yesterday and said, can we work on getting
 17 these depositions. And he said in substance, I
 18 suggest you continue working with those people,
 19 Mr. Gilligan and Mr. Fischer.
 20 I have letters Mr. Fischer has
 21 written to me, and there are others. The point
 22 is if they are going to be appearing on the
 23 case, they should put in a notice of
 24 appearance. And I respectfully request that

7 (Pages 22 to 25)

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1 you require them to do so.
 2 MR. BURKE: Your Honor, I don't
 3 know why it always has to be like this. Your
 4 Honor ruled back in the summertime saying let's
 5 take the discovery. We bent over backwards
 6 trying to accommodate Mr. Brautigam's request,
 7 produced several of KMK's attorneys for
 8 deposition.
 9 We produced every one of the
 10 people with a meaningful role in the
 11 transaction. Every one. They've all been
 12 deposed by Mr. Brautigam. Mr. Brautigam, when
 13 he began to threaten to sued us, actually sue
 14 us, demanded to depose our people, we go into a
 15 risk management scenario within our firm. When
 16 our firm is put at risk, there are people at
 17 our firm who, with the assistance of our
 18 malpractice carrier, are designated to help
 19 address those situations and to deal with those
 20 situations.
 21 It's out of my hands, Your Honor.
 22 Mr. Gilligan and Mr. Fischer are our two
 23 in-house partners. When our firm is being
 24 accused of something or being sued, they are

1 party pretty soon. The Court's order of
 2 scheduling made it very clear that, I assume
 3 after consultation with Judge Beckwith,
 4 discovery shall continue as to the old parties,
 5 discovery of the newly named parties, Ernst &
 6 Young and KMK, is stayed.
 7 THE COURT: You're right.
 8 MR. BURKE: So when Mr. Brautigam
 9 then said, I want to depose two more of your
 10 lawyers, people who frankly had nothing to
 11 offer, we said discovery has been stayed
 12 pursuant to Court order. And we don't believe
 13 that those depositions should occur now that we
 14 are parties or will be parties when Mr.
 15 Brautigam gets around to filing the complaint.
 16 So I guess I'm at a loss, how he can read the
 17 scheduling order, disregard it, and say I want
 18 more KMK depositions.
 19 MR. BRAUTIGAM: Your Honor, I
 20 completely disagree with the procedural history
 21 Mr. Burke has cited. I deposed four KMK
 22 attorneys pursuant to the original complaint
 23 because they worked on the proxy
 24 materials/registration statements. Before

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1 the people who are contractually required by
 2 our malpractice be carrier to be involved. And
 3 they have been involved with Mr. Brautigam
 4 conducting these affairs. Mr. Breidenstein is
 5 our counsel. Because we are lawyers, sometimes
 6 we also will attempt to work pro se, working
 7 through some of these issues. Mr. Gilligan and
 8 Mr. Fischer represented the KMK lawyers at
 9 their deposition.
 10 What has happened in this is the
 11 two lawyers he still wants to depose, we have
 12 already represented to him have no information
 13 that is relevant, okay? I understand he
 14 doesn't accept that, that's fine. But more
 15 importantly, when the Court issued its order on
 16 the disqualification motion and on the motion
 17 for leave to amend, then we talked scheduling
 18 with Your Honor. One of the issues we talked
 19 about was who -- what discovery can still go
 20 and what discovery should not go.
 21 Things were different at that
 22 point in time. We were not just dealing with
 23 the Court's issue, saying let's get discovery
 24 going, if KMK wasn't a party, we would be a

1 Judge Beckwith's order of October 20th, we had
 2 dates, we had schedules, we had agreements. I
 3 believe it was going to be done at KMK.
 4 And after the order, for some
 5 reason that's all gone by the wayside. So I
 6 have to attempt to negotiate, because this
 7 relates back to the original complaint. And if
 8 it relates -- if these depositions take place
 9 after the first of the year, it will relate to
 10 the consolidated amended complaint that you
 11 directed us to file. So Your Honor, I don't
 12 understand why they're objecting at all, let
 13 alone why they have a separate camp of KMK
 14 attorneys representing KMK, KMK witnesses.
 15 And frankly, Your Honor, we
 16 respectfully submit that this goes to the issue
 17 of the permission of their clients. I have
 18 reviewed the testimony of some of the KMK
 19 attorneys this morning. I have found that it's
 20 clearly adverse to at least some of their
 21 clients. And Mr. Burke says they obtained
 22 permission of the clients for continued
 23 representation. Okay, well, when we depose
 24 these people, we'll see. We'll see what that

8 (Pages 26 to 29)

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1 permission entails. I also want to point out
 2 that even though Mr. Fischer and Mr. Gilligan,
 3 Mr. Burke says that they represent KMK, et
 4 cetera, they have represented the very same
 5 defendants that Mr. Burke represents. In fact,
 6 Mr. Burke -- Mr. Mesh and --
 7 MR. BURKE: This is inappropriate,
 8 Mr. Brautigam.
 9 MR. BRAUTIGAM: -- and Mr.
 10 Gilligan conducted a settlement conference when
 11 Mr. --
 12 MR. BURKE: Mr. Brautigam, Mr.
 13 Mesh can speak for himself. Mr. Mesh called
 14 Mr. Gilligan as an old friend, in that channel,
 15 and attempted to start a settlement dialogue,
 16 which has nothing to do with the issues you've
 17 raised. Mr. Mesh is here and can say that.
 18 Mr. Gilligan, out of respect for a
 19 colleague of the bar and a friend, conducted
 20 those discussions at Mr. Mesh's request. For
 21 you to use that in an attempt to try to impugn
 22 Mr. Gilligan is inappropriate.
 23 MR. BRAUTIGAM: Jim, I --
 24 MR. BURKE: Mr. Mesh is here to

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1 MR. MESH: I think we should add
 2 also that Mr. Kreider was at many Board
 3 meetings at or about the time of your document
 4 review, his name appears. I think --
 5 MR. BURKE: Right.
 6 MR. MESH: -- he has relevant
 7 information.
 8 MR. BURKE: That's also
 9 attorney-client privilege --
 10 MR. MESH: Maybe, maybe not on a
 11 public document and a public restatement.
 12 MR. BURKE: But Ernst -- if you
 13 want to depose Mr. Kreider on the restatement,
 14 that's a different issue. That's a different
 15 issue. We're not talking about that. We're
 16 talking about the OHSL proxy material. That's
 17 what Mr. Brautigam is requesting in these
 18 depositions.
 19 MR. MESH: And are they different
 20 from the Provident proxy materials?
 21 MR. BURKE: They are the same
 22 proxy materials, but they have nothing to do
 23 with the restatement.
 24 MR. PINNEY: We're having ships

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1 correct me if I have stated anything
 2 incorrectly.
 3 MR. BRAUTIGAM: I'm sure he will.
 4 MR. MESH: Let me just state to
 5 the Court that I called Mr. Gilligan regarding
 6 some type of overall settlement. He undertook
 7 it. Undertook the experience to represent all
 8 of the defendants and getting back to me with
 9 what he -- what he called a settlement offer to
 10 which we never responded.
 11 MR. BRAUTIGAM: Your Honor,
 12 there's a letter -- Mr. Gilligan writes a
 13 letter, pursuant to our settlement meeting.
 14 Mr. Gilligan became engaged in these
 15 negotiations, it's a fact.
 16 MR. BURKE: What does that have to
 17 do with anything?
 18 MR. BRAUTIGAM: Your Honor, this
 19 goes to the Fischer/Gilligan camp filing a
 20 notice of appearance, because it goes to the
 21 consent and the permission of the clients they
 22 represent, and of the continued representation.
 23 THE COURT: I have no idea what
 24 the purpose --

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1 pass in the night, because Mr. Brautigam is
 2 referring, as I understand it, to conflict of
 3 interest/representational issue kind of matters
 4 and not merit issues with respect to the claims
 5 in this litigation. They're obviously going to
 6 be entitled to take depositions of all relevant
 7 witnesses in due course of KMK, but that's
 8 stayed for the time being.
 9 And as a consequence, there seems
 10 to be no reason to rush to judgment. And the
 11 motivation, I suggest, is to either embarrass
 12 or to create some kind of perceived conflict
 13 issue beyond that which has already been dealt
 14 with by Judge Beckwith, and not to go to the
 15 merits of the dispute in the litigation.
 16 MR. MESH: Maybe it would all be
 17 clarified if they would file a notice of
 18 appearance.
 19 MR. BURKE: What does that do for
 20 you, Gene? If they were to file notices, how
 21 would that help you do anything?
 22 MR. BRAUTIGAM: Your Honor, it
 23 tells us who to deal with, who to negotiate
 24 with, because I'm getting bounced around. And

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1 with all due respect --
 2 THE COURT: Mike, in the real
 3 world if you sue Keating, Muething & Klekamp,
 4 I'm sure the word of this case has been
 5 thoroughly digested through much of the firm.
 6 And ultimate settlement discussions are going
 7 to be conducted probably with the input of a
 8 lot of people. What does that do for you in
 9 terms of the merits of the case?

10 I mean, Fischer or Gilligan or
 11 Burke or whoever it is that does the settlement
 12 negotiations -- I thought this started with
 13 your argument that you wanted Mr. Gilligan and
 14 Mr. Fischer to file notices of appearance in
 15 this case.

16 MR. BRAUTIGAM: Yes, Your Honor.

17 THE COURT: And if that happens,
 18 what would that do for you?

19 MR. BRAUTIGAM: Well, Your Honor,
 20 that would go to the consent, and with respect
 21 to Judge Beckwith's order disqualifying them,
 22 because in part they're protecting themselves.

23 MR. BURKE: There are four lawyers
 24 -- the key four lawyers in the underlying

1 MR. PINNEY: Are you talking about
 2 KMK lawyers, Gene?

3 MR. MESH: Yes, who were directed
 4 not to answer questions posed to them, based on
 5 the merits of the case.

6 THE COURT: So what you're
 7 suggesting, if I'm following you, is that the
 8 KMK lawyers who were defending the depositions
 9 and giving the instructions to the deponent had
 10 a conflict of interest and, therefore, you're
 11 questioning whether or not their instructions
 12 were proper?

13 MR. MESH: That's right.

14 MR. BURKE: Bring a motion to
 15 compel.

16 MR. MESH: We should be able to
 17 inquire into those areas again.

18 MR. BURKE: Bring a motion, Gene,
 19 if you have anything specific, because I will
 20 present those transcripts before the Court
 21 tomorrow.

22 THE COURT: I don't necessarily
 23 disagree with that, but I'm thinking what does
 24 a notice of appearance have to do with that?

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1 document. This is akin to having a lawyer deal
 2 directly with an in-house counsel. Are you
 3 going to make the in-house counsel file notices
 4 of --

5 THE COURT: No, I'm not. I'm not
 6 going to make Mr. Gilligan or Fischer do it,
 7 either. It is silly. It doesn't do anything
 8 except create more chaos and this case needs
 9 less.

10 MR. MESH: Your Honor, you know --
 11 excuse me.

12 THE COURT: Go ahead.

13 MR. MESH: It should be noted that
 14 during the depositions of the lawyers of KMK,
 15 there were dozens of do-not-answer directions
 16 on key issues of inquiry on the plaintiff's
 17 side. They remain unanswered at this point in
 18 time. If they are no longer qualified to
 19 represent these particular individuals on those
 20 inquiries, we have a right to go back into
 21 those merit issues.

22 MR. BURKE: There is no -- I don't
 23 understand, Gene. Without any specific
 24 ruling --

1 MR. BRAUTIGAM: Your Honor,
 2 perhaps we can simplify this. If you could
 3 direct KMK or Mr. Breidenstein or someone to
 4 negotiate with me to produce Mr. Kreider and
 5 Mr. Rosenberg's deposition that were previously
 6 scheduled, that would be fine.

7 MR. BURKE: Your Honor, discovery
 8 is stayed as to KMK.

9 MR. BRAUTIGAM: It's not stayed
 10 with respect to KMK, Jim. It's not stayed,
 11 okay? I have deposed the four attorneys --

12 MR. BURKE: Please don't raise
 13 your voice.

14 THE COURT: Do you have the
 15 schedule?

16 MR. BURKE: I guess I fail to see
 17 what is so difficult with the scheduling order.

18 MR. BRAUTIGAM: Jim, let me
 19 explain it to you. I have deposed four KMK
 20 attorneys --

21 THE COURT: I read it, because I
 22 discussed it with Judge Beckwith. That was, in
 23 fact, the only question presented to her, as I
 24 told you guys the last time we met. The rest

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1 of this was worked out. The only other issue
2 was whether or not there was going to be a stay
3 of discovery with respect to anybody. And she
4 and I discussed that matter and I followed
5 through on what she wanted to do.

6 MR. BRAUTIGAM: Your Honor, I
7 don't understand why Mr. Burke is surprised. I
8 want to take the deposition of these two
9 additional KMK attorneys for the same reasons
10 that I took the depositions of the other four,
11 to talk about the proxy materials and
12 registration statement that they co-wrote. To
13 the extent that that relates back to the
14 original complaint, that's appropriate
15 discovery and it's not stayed.

16 MR. BURKE: But the original
17 complaint is superseded by the amended that you
18 are yet to file.

19 THE COURT: Is there a motion to
20 dismiss filed?

21 MR. BURKE: No, because they
22 haven't filed an amended complaint.

23 THE COURT: Isn't that the answer
24 to this? It's only stayed till the decision on

1 There was some procedural
2 confusion surrounding the October 20th order
3 and now we're trying to get everything back on
4 track. And as part of that, I want to depose
5 the other two attorneys who actually worked on
6 the proxy materials/registration statement.

7 That relates to the original
8 complaint, to the original allegations, however
9 you want to put it. I want to put the proxy
10 materials in front of them and ask, as I did
11 with the others, what did you write.

12 THE COURT: Here's my suggestion
13 about how to do that. If you file a simple
14 motion -- don't get into 50 pages, a one page
15 thing that says that -- what you want to do and
16 why this order you think should not apply, or
17 it was overbroad or whether it was not intended
18 to cover what, what it says on its face. Let
19 Jim respond with a simple one page reply, and
20 I'll talk to Judge Beckwith about it and will
21 probably issue a joint order within a week and,
22 bingo, that's done.

23 MR. BURKE: Thank you, Your Honor.

24 MR. BRAUTIGAM: Thank you, Your

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1 the motion to dismiss is rendered?

2 MR. BRAUTIGAM: But Your Honor,
3 this does not go -- what I want to ask these
4 attorneys is not related to new issues directly
5 against KMK, it's related to the proxy
6 materials/registration statement that they
7 coauthored. So for the same reasons that I was
8 able to depose the four KMK attorneys over the
9 summer or the fall, I should be able to depose
10 these two.

11 MR. BURKE: There is a stay.

12 MR. BRAUTIGAM: The order allows
13 discovery to go forward with respect to this
14 topic.

15 THE COURT: I don't think so, but
16 I see what your point is, you're -- your point,
17 I think, is that that may not have been
18 contemplated when that order was written. It
19 could be true.

20 MR. BRAUTIGAM: Your Honor, I see
21 the six attorneys as the same. They all
22 participated to whatever extent in the writing,
23 the coauthoring of the proxy materials and
24 registration statement. I deposed four.

1 Honor.

2 THE COURT: That seems to me --
3 you want to, and it may be -- I can see that it
4 may not have taken into consideration what
5 you're talking about.

6 MR. BRAUTIGAM: Your Honor, I --

7 THE COURT: You want to depose
8 them on things that would predate the concern
9 that they share with Ernst & Young.

10 MR. BRAUTIGAM: Your Honor, I
11 would argue that it should not apply and I
12 should therefore be able --

13 MR. BURKE: Maybe I can add one
14 other point while we're all here, and that is
15 that we haven't seen the new amended complaint
16 that presumably is forthcoming, but it just
17 strikes me that the plaintiffs have to make the
18 position themselves, so that if Judge Beckwith
19 has ruled that KMK attorneys are going to
20 ultimately be witnesses in the case, therefore
21 they can't serve as trial attorneys, that there
22 is another whole issue or area of dispute
23 that's manifesting itself today.

24 Otherwise, by naming KMK as a

11 (Pages 38 to 41)

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1 defendant in the case -- because the issue that
2 I think is creating this major problem here is
3 naming KMK as a defendant. And I'm not going
4 to opine, nor do I have an opinion with regard
5 to whether there's any merit, but it sure
6 confuses and complicates all of the issues in
7 the case and makes it a mess and makes us have
8 to come back time and time again to deal with
9 sticky issues that I think, unfortunately,
10 don't really go substantively to the merits of
11 the case and the likelihood of a successful
12 prosecution of claims or a defense of.

13 MR. MESH: May I ask the Court --

14 MR. PINNEY: I think you can go
15 ahead and take these depositions if you simply
16 withdraw your claims against KMK.

17 MR. MESH: I assumed that was
18 going to be suggested.

19 MR. BRAUTIGAM: Your Honor, I --

20 MR. BURKE: Your Honor, I would
21 suggest that at least Mr. Brautigam has now
22 given the Court a basis on which he thinks he
23 has the right to do this. Mr. Mesh on the
24 other hand has referred to Mr. Kreider's role

1 immediately. And, Your Honor, I have one other
2 point.

3 MR. BURKE: I have to file a
4 motion anyway, Mike.

5 MR. BRAUTIGAM: A motion for?

6 MR. BURKE: I mean, you're not
7 going to get it before the 31st anyway.
8 Secondly, I would point out that my
9 recollection when we had the scheduling order
10 was you were going to file your complaint the
11 next week or the next month, so we could have
12 been past that.

13 MR. BRAUTIGAM: Jim, I'm complying
14 with the orders of the Court, okay?

15 MR. BURKE: Okay.

16 MR. BRAUTIGAM: Your Honor, I
17 respectfully request that we have another
18 status conference in another month just to see
19 where we are, to see if anything has happened,
20 instead of doing this on sort of an ad hoc
21 basis.

22 I think if we had the hammer of a
23 deadline, a meeting, perhaps all parties would
24 compromise and be more reasonable. And in a

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1 in a restatement, which was clearly a post
2 amended fact.

3 Does the Court think it's
4 appropriate, that we can walk a fine line
5 between KMK as a witness to the proxy statement
6 in 1999, versus whatever claims these two
7 gentlemen choose to invent as to my firm?
8 Should we at least see what the amended
9 complaint is so we can try to parse out, is
10 this area of inquiry going to the old claims or
11 is it an attempt to sort of backdoor the stay
12 of discovery. Should we at least wait --

13 MR. BRAUTIGAM: This has already
14 been decided. You ruled that discovery should
15 move forward.

16 THE COURT: When are you going to
17 file the amended complaint?

18 MR. BRAUTIGAM: December 31st,
19 2003, Your Honor.

20 MR. BURKE: We're going to have to
21 schedule these depositions after that.

22 MR. BRAUTIGAM: Your Honor,
23 nothing happens in this case. And we
24 respectfully suggest that we move forward

1 month you can see if anything has happened or
2 if problems remain, so I would like to ask
3 schedule that, if possible.

4 THE COURT: Phone Barbara, I will
5 talk to you as often as you want.

6 MR. BRAUTIGAM: Thank you very
7 much, Your Honor.

8 THE COURT: I think just -- I kind
9 of think it does make sense from an analytical
10 point of view to follow the amended complaint
11 to see what claims are pending before you start
12 taking depositions.

13 I'm understanding -- everybody
14 understands this case is old and needs to get
15 moving. I mean, I have certainly said that
16 more than once, but I mean, it seems to me when
17 you move in a chaotic way, it just creates more
18 of a mess and takes more time. Jim, I -- Jim
19 is making sense here. I don't, you know, why
20 can't this happen after the amended complaint
21 is filed?

22 MR. BRAUTIGAM: Your Honor, I
23 would just remind you that from our earlier --

24 THE COURT: It puts the pressure

12 (Pages 42 to 45)

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1 back on you to get the things filed.
 2 MR. BRAUTIGAM: Your Honor, at our
 3 earlier conference on Election Day, November
 4 4th, I said we could reasonably file the
 5 complaint by November 15th. And you said, no,
 6 that's been decided, December 31st. I then
 7 asked, Your Honor, if we filed the complaint
 8 earlier, would you tie KMK and the other
 9 defendants' time to when we file it. You said,
 10 no, that issue has been decided. You have
 11 until the 31st, they have until the 20th. So
 12 it's not in our interest to file the complaint,
 13 even if it were ready, before the 31st.

14 THE COURT: Okay. I've got you.
 15 So I said the 31st and you want me to deliver
 16 on the 31st. I can do that.

17 MR. BRAUTIGAM: Well, Your Honor,
 18 we would have been happy to file it earlier,
 19 Your Honor, as long as the dates for them to
 20 respond were linked to when we actually filed.

21 THE COURT: I've got you.

22 MR. BURKE: If I understand, Your
 23 Honor, just to recap so there's no
 24 misunderstanding, I'm going to contact Dr.

1 THE COURT: You, too.

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 5 (Hearing concluded at 11:17 a.m.)
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1 Smith either in a letter or some kind of a
 2 conference, and try to get closure on some of
 3 these issues.

4 The other two, we talked about the
 5 other defendants being seriatim, about an hour
 6 each at the offices of KMK in the reasonably
 7 near future. Number three, the simple motion
 8 that Mr. Brautigam is going to file to which we
 9 will respond on the KMK depositions.

10 Now, whether -- I don't know
 11 whether we have closure on whether that's
 12 before or after the amended complaint. In any
 13 event, pending the disposition of that motion,
 14 we obviously can't take the depositions. But
 15 after the motion is decided, we will arrange
 16 for those to the extent they are --

17 THE COURT: I'm going to say
 18 essentially that -- before the end of the day,
 19 but beyond, okay?

20 MR. MESH: Thank you, Your Honor.

21 MR. BRAUTIGAM: Thank you very
 22 much for your time.

23 MR. MESH: And happy holidays,
 24 everybody.

1 CERTIFICATE

2
 3 I, Lee Ann Williams, a Notary Public in
 4 and for the State of Ohio, do hereby certify
 5 that the foregoing is a true and correct
 6 transcript of the proceedings in the foregoing
 7 captioned matter, taken by me at the time and
 8 place so stated and transcribed from my
 9 stenographic notes.
 10
 11

12 My commission expires:
 13 August 26, 2004 Lee Ann Williams, RPR
 14 Notary Public-State of Ohio
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